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COURT OF CRIMINAL APPEALS
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NO. PD-0309-20

IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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NO. 07-18-00375-CR

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS AT AMARILLO

DARREN LAMONT BIGGERS

V.

THE STATE OF TEXAS

Cause No. CR17-00073
In the 235th District Court of
Cooke County, Texas

APPELLANT'S BRIEF ON DISCRETIONARY REVIEW

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

STATEMENT REGARDING ORAL ARGUMENT

The Court did not grant oral argument.

STATEMENT OF THE CASE

The appellant was charged with the offense of Possession of a Controlled Substance, Penalty Group 4, in an amount greater than 400 grams. (CR at 5, SCR at 127). At trial, the appellant entered a plea of "not guilty." The appellant was found guilty by the jury. (CR at 23). The jury sentenced appellant to sixty (60) years confinement TDCJ-ID. (CR at 23). On appeal, the Seventh Court of Appeals reversed the conviction and entered a judgment of acquittal.

The State petitioned this court for review.

QUESTION PRESENTED FOR REVIEW

When the State alleges, but fails to prove, the codeine mixture the defendant possessed contains a sufficient proportion of another medicine to be medicinal, should he be acquitted?

STATEMENT OF FACTS

A confidential informant was arrested and told officers he could possibly arrange a drug transaction. He offered to call the appellant and have him deliver methamphetamine to the Dollar General. (IV RR at 26). An individual the informant identified as the appellant arrived at the Dollar General and law enforcement conducted a traffic stop. The appellant was in the passenger seat of the vehicle. (IV RR at 35). After the two occupants were removed from the vehicle due to the smell of marijuana, officers observed a Styrofoam cup and a bottle containing a purple liquid. (IV RR at 78). The officer believed this to be codeine mixed with Sprite—referred to as "lean." (IV RR at 79).

Mallory Jenkins, a chemist with the DPS Crime Laboratory testified regarding the purple substance. Her initial observation upon opening the substance was that it had an odor of cough syrup or something like cough syrup. (IV RR at 121). After testing the substance, Jenkins testified it contained codeine and promethazine. (IV RR at 121). She stated that codeine is a narcotic analgesic and promethazine is an antihistamine and that the two paired together are usually seen in cough syrups. (IV RR at 123). Jenkins testified she did not quantify the ingredients in the tested substance, but only confirmed the identity of the substance. Testing also did not allow her to determine that there was no more than 200-milligrams of codeine per 100 milligrams in the mixture. (IV RR at 140).

SUMMARY OF THE ARGUMENT

The Court of Criminal Appeals has previously held the "valuable medicinal qualities" language to be an element of the offense of Penalty Group 4 possession of codeine. The State asks this Court to consider the language not to be an element Penalty Group for Possession, but instead something to be disproven in Penalty Group 1 Possession. Because Penalty Group 1 and 4 possessions are separate and distinct offense and Penalty Group 4 possession is not a lesser-included offense of Penalty Group 1 possession, the "valuable medicinal qualities" language should continue to be considered an element of Penalty Group 4 possession and the Court require proof thereof when a defendant is so charged.

ARGUMENTS AND AUTHORITIES

The indictment

As indicted, the State had the burden to prove the appellant "intentionally or knowingly possessed a Penalty Group 4 controlled substance, namely a compound, mixture, or preparation in an amount of 400 grams or more, that contained not more than 200 milligrams of codeine per 100 milliliters or 100 grams and one or more nonnarcotic active ingredients in sufficient proportions to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone." (SCR at 127). See also TEX. HEALTH & SAFETY CODE 481.105(1).

The law regarding unlawful possession of codeine

Possession of codeine, without a prescription, is prohibited by the Texas Health and Safety Code. Penalty Group 4 consists of a compound, mixture, or preparation containing not more than 200 milligrams of codeine per 100 milliliters of per 100 grams that includes one or more nonnarcotic active medicinal ingredients in sufficient proportions to confer on the compound, mixture, of preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. TEX. HEALTH & SAFETY CODE 481.105(1). This offense sets out two elements distinct from other penalty group codeine possessions: (1) a concentration of not more than 200 milligrams of codeine per 100 milliliters or per 100 grams; and (2) one of more nonnarcotic active medicinal ingredients in sufficient proportions to confer a valuable medicinal quality other than those possessed by the narcotic drug alone. *Id.*

Penalty Group 3 consists of a material, compound, mixture, or preparation containing limited quantities of not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts. TEX. HEALTH & SAFETY CODE § 481.104(4). The distinct elements in Penalty Group 3 possession are a higher concentration, (1) not more than 1.8 grams of codeine per 100 milliliters; and (2) one or more active nonnarcotic ingredients in recognized therapeutic amounts. *Id.*

Penalty Group 1 consists of a salt compound, derivative, or preparation of opium not listed in Penalty Group 3 or 4 , and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine derived butorphanol, nalmefene and its salts, naloxone and its salts, and naltrexone and its salts, but including codeine not listed in Penalty Group 3 or 4. TEX. HEALTH & SAFETY CODE § 481.102(3)(A).

The court below

The appellant argued at the court below the evidence was insufficient to sustain a conviction for the offense of possession of codeine on two separate grounds: (1) the evidence was insufficient to prove the level of concentration of codeine in the substance possessed; and (2) the evidence was insufficient because while the State proved the presence of promethazine, they did not prove it was in sufficient proportions to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine alone. *Biggers v. State,* 601 S.W.3d 369, 376 (Tex.App.-Amarillo 2020, pet. granted).

The court below stated that, as relevant to the indictment and the facts presented, in order to affirm a conviction for possession of a Penalty Group 4 controlled substance, 400 grams or more, the State was required to prove (1) Appellant (2) knowingly or intentionally (3) possessed (4) more than 400 grams of a compound, mixture, or preparation (5) containing not more than 200 milligrams of codeine per 100 milliliters, (6) that also contained one or more nonnarcotic active medicinal ingredients (7) in a sufficient proportion to confer on the compound, mixture or preparation valuable medicinal qualities other than those possessed by the codeine alone. *Id* at 374. TEX. HEALTH & SAFETY CODE §§ 481.105(a); 481.118(a).

The court further stated that under 481.105 of the Texas Health and Safety Code, in order for possession of a of the compound, mixture, or preparation to be an offense classified as a Penalty Group 4 controlled substance, the concentration level of the codeine must be "not more than 200 milligrams of codeine per 100 milliliters or per 100 grams. *Id.* Also, the mere presence of a nonnarcotic active medicinal ingredient is not sufficient to establish that the compound, mixture, or preparation is a Penalty Group 4 controlled substance; rather the nonnarcotic active medicinal ingredients must be in a sufficient proportion to convey on the mixture "valuable medicinal qualities" other than those possessed by the codeine alone. *Id* at 374-375 citing *Sanchez v. State,* No. 01-06-00210-CR 2010 Tex. App. LEXIS 4857, at 24 (Tex. App.-Houston [1st Dist.] June 24, 2010, no pet.) (mem. op., not designated for publication) (citing *Melton v. State,* 120 S.W.3d 339, 334 (Tex.Crim.App.2003)).

The court below found the State was only able to establish the samples were a compound, mixture, or preparation containing 982.54 net grams of a substance that contained codeine and promethazine, and nothing more. The court specifically found the chemist failed to establish the concentration level of the codeine was not more than 200 milligrams of codeine per 100 milliliters, and she did not establish the present of promethazine in a sufficient proportion to convey on the mixture "valuable medicinal qualities" other than those possessed by the codeine alone. The court also stated these two essential elements were not established by the testimony of other witnesses. Consequently, the court ultimately found the evidence to be insufficient to support a conviction for the Penalty Group 4 possession offense. *Id* at 376.

The State's argument

The State does not contend the evidence was sufficient to show what the appellant argued it lacks. That is, it's not the State's contention there was evidence establishing the concentration level of the codeine was not more than 200 milligrams of codeine per 100 milliliters or establishing the presence of promethazine in a sufficient proportion to convey on the mixture "valuable medicinal qualities" other than those possessed by codeine alone. Instead, the State argues it should not need to prove those elements for the evidence to be sufficient.

Concentration levels

The court below held the State must prove the codeine concentration was less than 200 milligrams of codeine per 100 milliliters. The State contends detection of codeine in any

amount "should suffice to prove § 481.105's requirement of 'not more than' 200 mg/100mL—or any maximum threshold." (State's brief at 14).

Medicinal effect

The State contends its failure to prove medicinal effect should not result in an acquittal for possession of Penalty Group 4 codeine. The State argues that, while the medicinal effect language has the appearance of an element of the offense, the language of the Penalty Group 1 statute serves to make the language only negate an element for the Penalty Group 1 statute and should not be treated as an element for the purpose of Penalty Group 4. (State's brief at 16-17).

Argument

This Court has previously recognized that the Due Process Clause of the 14th Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Miles v. State,* 357 S.W.3d 629, 631 (Tex.Crim.App.2011) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). The standard for appellate review under that Clause is whether an appellate court can say that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier could have found the essential elements of the crime beyond a reasonable doubt. *Id.* (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The question posed to this Court in the present case, however, is what constitutes the "essential elements" of the offense of possession of Penalty Group 4 codeine. This Court has previously held that "not more than 200 milligrams of codeine per 100 milliliters

of per 100 grams" and "one or more nonnarcotic active medicinal ingredients in sufficient proportion to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone" were essential elements to this possession. *Sanchez v. State,* 275 S.W.3d 901 (Tex.Crim.App.2009). In *Sanchez,* this court was faced with the question of whether or not the State was required to prove the numerical concentration of the nonnarcotic ingredient in a Penalty Group 4 prosecution to prove the "valuable medicinal qualities" element of the offense. In finding that the chemist's testimony that promethazine, on its own, has a valuable medicinal quality, was sufficient to prove "valuable medicinal qualities," the Court held it was an essential element of the Penalty Group 4 prosecution. *Id.* at 904-905.

In asking this Court not to consider "valuable medicinal qualities" as an essential element to Penalty Group 4 possession, it is necessarily asking the Court to find that Penalty Group 4 codeine possession is a lesser-included offense of Penalty Group 1 codeine possession. In relevant part, Article 37.09 of the Texas Code of Criminal Procedure states that an offense is a lesser included offense if it established by proof of the same or less than all of the facts required to establish commission of the offense charged. TEX. CODE CRIM. PROC. Art. 37.09(1). Based on 37.09, and as defined in the relevant statutes Penalty Group 4 possession is not a lesser-included offense of Penalty Group 1 possession in that additional proof is required to prove the Penalty Group 4 possession.

As previously stated, Penalty Group 1 codeine possession is defined as consisting of a salt compound, derivative, or preparation of opium not listed in Penalty Group 3 or 4, and a salt, compound, derivative, or preparation of opium or opiate, other than thebaine

derived butorphanol, nalmefene and its salts, naloxone and its salts, and naltrexone and its salts, but including Codeine not listed in Penalty Group 3 or 4. TEX. HEALTH & SAFETY CODE § 481.102(3)(A). On the other hand, Penalty Group 4 possession is defined as a compound, mixture, or preparation containing not more than 200 milligrams of codeine per 100 milliliters of per 100 grams that includes one or more nonnarcotic active medicinal ingredients in sufficient proportions to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. TEX. HEALTH & SAFETY CODE 481.105(1). Penalty Group 4 codeine requires proof of a nonnarcotic active medicinal ingredient in sufficient proportions to confer on the compound, mixture, or preparation valuable medicinal qualities other than those possessed by the codeine—an element distinct from Penalty Group 1 possession. Consequently, Penalty Group 4 and Penalty Group 1 possessions are separate and distinct offenses.

The State relies, in part, on the concurrence by Judge Johnson in the *Sanchez* case for its support for the position that the "valuable medicinal qualities" language should not be treated as an element of Penalty Group 4 Possession. (State's brief at 17). Judge Johnson, however joined Judge Cochran's concurrence in the more recent *Miles* decision where Judge Cochran expressly endorsed the idea the "valuable medicinal qualities" language constitutes an element of Penalty Group 4 possession and the idea Penalty Group 1 and Penalty Group 4 possessions are separate and distinct offenses. The concurrence states, after quoting the Penalty Group 4 language, "…when the State wants to charge a defendant with unauthorized possession of regular prescription 'cough syrup,' this is what it should both plead and prove. The indictment should allege all that verbiage, the jury

charge should include all that verbiage, and a witness must testify that the substance analyzed fits that lengthy definition." *Miles*, 357 S.W.3d at 339-40 (Cochran, J., concurring). The concurrence continues by making the same assessment regarding Penalty Group 3 possession, concluding "a witness must testify that the substance possessed by the defendant meets *that specific definition.*" *Id* (emphasis added).

This Court has previously considered the "valuable medicinal qualities" language to be an essential element of a Penalty Group 4 codeine possession requiring proof beyond a reasonable doubt. The State asks the Court to take a detour from this position because this interpretation of § 481.105 "leads to the absurd argument 'acquit me because I'm even guiltier than the State alleged.'" (State's brief at 18). However, if this Court continues to hold the "valuable medicinal qualities" language to be an element of Penalty Group 4 possession the result is—"I'm not guilty of the offense for which I have been charged." It should be of no consequence the appellant might be guilty of a separate, distinct offense, even if that offense carries a greater punishment or is more "severe." Prosecutors are commonly faced with charging decisions made based on what they believe the proof at trial will show. Penalty Group 1 and Penalty Group 4 offenses are distinct and separate and the State should not be relieved of their burden to prove the offense alleged in the indictment. *Id.*

Consequently, this Court should continue to hold the "valuable medicinal qualities" language" to be an element of Penalty Group 4 codeine possession and require proof thereof when so alleged.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that the Court affirm the court of appeals. Appellant prays for any such further relief to which he may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLAIANCE

This petition complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 2,436 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

/s/ Jeromie Oney

Jeromie Oney

CERTIFICATE OF SERVICE

I do hereby certify that on the 1st day of December, 2020 a copy of the Appellant's Brief on the Merits was served to:

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